Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 273(d)(5)	)	
of the Communications Act of 1934,	)	GC Docket No. 96-42
as amended by the Telecommunications	)	
Act of 1996 -- Dispute Resolution	)	
Regarding Equipment Standards	)	

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits these comments on the Notice of Proposed Rulemaking in the above-captioned docket.[1]

In the Notice, the Federal Communications Commission ("Commission") seeks comment on how to implement the requirements of Section 273(d) of the Telecommunications Act of 1996 that a dispute resolution process be established for non-accredited standards bodies establishing generic standards for local exchange interfaces to the extent that the participating parties cannot devise their own dispute resolution process.[2] Particularly in light of the short time allotted the Commission to adopt rules under this section of the statute (90 days) and the even

[1] In the Matter of Implementation of Section 273(d)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 -- Dispute Resolution Regarding Equipment Standards, GC Docket No. 96-42, Notice of Proposed Rulemaking, FCC 96-87, rel. Mar. 5, 1996 ("Notice").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) at § 273 (d)(5) ("Telecommunications Act" or "Act"). Industry-wide generic requirements are defined in the Telecommunications Act as including only local exchange carrier ("LEC") products and interfaces. Section 273(d)(8)(C) and (D). The dispute resolution section of the statute appears to apply only to non-accredited bodies. Section 273(d)(4).

shorter time granted to actually resolve disputes (30 days), the Commission specifies its preference for binding arbitration as the method of resolving disputes in the absence of a method agreed upon by the funding parties to a standards setting entity.[3]

The establishment of industry-wide standards for telecommunications equipment (or industry-wide generic requirements for such equipment), the activity to which Section 273(d)(5) applies, is a complex, difficult and often time-consuming task. This is especially the case because industry standards and generic requirements established in such bodies are not binding on anyone -- even the funding parties themselves. As such, disputes over technical standards are particularly ill-suited for adjudication, binding arbitration or other coercive dispute resolution mechanisms. Nothing in the Telecommunications Act changes this fundamental fact -- standards setting activities, by both accredited and non-accredited entities, continue to remain voluntary, depending almost entirely on the good faith of the individual funding entities for their ultimate success or failure. In this context, a dispute resolution mechanism such as binding arbitration could end up binding dissenting parties to nothing because those parties do not agree with the result of the arbitration.

Moreover, even the most well-reasoned decision of an impartial arbitrator on a complex technical issue could ultimately prove wrong. Technology will not bend itself to meet the expectations of arbitrators, no matter how well-intentioned. Thus,

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[3] Notice ¶ 4.

even if standards setting entities could indeed bind their funding parties, they cannot alter the laws of nature, or by fiat turn an inferior technology into a superior one. A choice made by an arbitrator and imposed on the parties could never substitute for the technical reality which mediated consensus would reflect.

In short, despite the indisputably accurate characterizations of Section 273(d)(5) of the new Act in the Notice, we submit that any system of binding arbitration or other judicial or quasi-judicial method of resolving disputes is doomed to become quickly meaningless.

Obviously the preferable course of action in any standards setting activity is for all funding parties to agree beforehand on the proper method of resolving disputes. In other words, the Act specifically evidences a preference for mutually agreed-upon dispute resolution processes, and the mere existence of a rule specifying binding arbitration as the default dispute resolution mechanism might in itself convince the funding parties of a standards setting entity to agree in advance upon a better process. Nevertheless, adoption of a bad rule in the hope that the rule itself would discourage its use seems to constitute poor policy-making, even if the Commission were motivated to adopt such a dubious structure. We submit that the proper dispute resolution mechanism in the context of Section 273(d)(5) of the Act is one which facilitates voluntary resolution of disputes among funding parties. Mediation of disputes is one alternate dispute resolution mechanism with which U S WEST has some significant and satisfactory experience, and U S WEST recommends that the Commission adopt rules in this docket which direct disputing

funding parties in standards setting entities who have not preselected a dispute resolution mechanism to settle their disputes via the vehicle of mediation. Very limited rules need to be adopted in this docket to guide how such mediation should take place.

Mediation is an informal process by which parties analyze their dispute with the assistance of an impartial person, the mediator. Mediators arrange an agenda for the negotiations and an exchange of information necessary to reach settlements of disputes, provide a "reality check" for the parties as they discuss settlement alternatives and try to prevent the emotions of the parties from disrupting progress towards settlement. Frequently during the mediation process, mediators meet separately with the parties and their attorneys to discuss options the parties have considered but have been reluctant to discuss with other parties. Mediators help the parties explore alternatives and may suggest ways of resolving the dispute, but mediators may not impose a settlement on the parties.

Traditionally, any party or parties to a dispute may initiate mediation by filing with the administrator for the organization selected to run the mediation, a submission to mediation or a written request for mediation pursuant to the administrators' rules, together with an appropriate administrative fee. A request for mediation contains a brief statement of the nature of the dispute and the names, addresses, and telephone numbers of all parties to the dispute (in this case, all funding parties) and those who will represent them in the mediation. The initiating

party simultaneously files two copies of the request with the administrator and one copy with every other party.

Thereafter the administrator appoints a qualified mediator to serve on the case. The parties are provided with a biographical overview of the mediator, and are instructed to review the profile closely and advise the administrator if they have any objection to the appointment. Since it is essential that the parties have complete confidence in the mediator's ability to be fair and impartial, the administrator will replace any mediator not acceptable to the parties. Normally, a single mediator is appointed unless the parties agree, or the administrator determines otherwise. In addition, if the parties agree in advance on a particular mediator or method of selecting a mediator, that agreement governs (although under the Act, presumably if parties were able to agree on the identities of mediators in advance, there would be no need for the Commission to intervene). The administrator will replace a mediator (or immediately inform the parties) if information comes to light which might reflect on the impartiality of the mediator.

Normally the mediator fixes the date and time of each mediation session. At least ten days prior to the first scheduled mediation session, each party is required to provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be exchanged by the parties. At the first session, the parties are expected to produce all information reasonably required for the mediator to under-

stand the issues presented, and the mediator has the authority to require any party to supplement its initial submission.

The mediator does not have the authority to impose a settlement on the parties, but attempts to help them reach a satisfactory resolution. During the mediation process, the mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expense of obtaining such information. Arrangements for obtaining such additional advice and information are generally made by the mediator or by the parties, as determined by the mediator. If a satisfactory workable agreement is reached, it is reduced to writing, and each party receives a copy of the agreement. If, in the judgment of the mediator, further efforts as mediation would not contribute to a resolution of the dispute, the mediator is authorized to end that mediation.

Mediation sessions are private. The parties and their representatives may attend mediation sessions, but other persons generally may attend only with the permission of the parties and with the consent of the mediator. Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation is not divulged by the mediator, and all records, reports, or other documents received by a mediator while serving in that capacity are retained as confidential. Generally the mediator may not be compelled to divulge such records or to testify in regard to the mediation in any adversarial proceeding or judicial forum.

Such confidentiality normally extends to views expressed by a party with respect to a possible settlement of the dispute, admissions made by a party, and statements by a party indicating a willingness (or unwillingness) to accept a proposal for settlement.

Obviously the course of a particular dispute resolution via mediation can become quite sophisticated, but the basic mechanics of the process are fairly simple and well adapted to standards setting processes. We submit that mediation is far superior to arbitration in this context.

Two additional issues deserve brief comment.

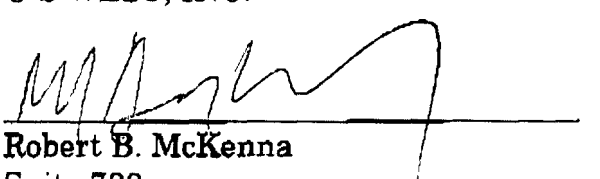
First, mediation always leaves open the possibility that no resolution of a particular dispute will be reached. We submit that this possibility simply must be accepted, and does not detract from the attractiveness of mediation as the preferred dispute resolution mechanism in a standards setting context. In this context, some disputes simply cannot be resolved -- amicably or with hostility -- in a short time frame, and a more coercive type of resolution (binding arbitration or court adjudication, for example) would still not guarantee that an industry-wide standard had been accepted by the industry. The fact that mediation may not succeed in all cases simply reflects the reality that some disputes may not be resolvable, and does not detract from the soundness of the mediation concept itself.

Second, the Notice seeks comment (as required by the Act) on how to establish penalties "to be assessed for delays caused by referral of frivolous disputes to the

dispute resolution process."[4] While standard setting under the new Act is likely to be contentious at times, and while U S WEST has witnessed numerous issues of abuse of the processes of this Commission by entities attempting to prevent LECs from entering competitive marketplaces, the notion of punitive actions being taken to prevent the frivolous invocation of the mediation process seems unnecessary. A funding party in a standards setting entity has ample opportunity to prolong proceedings if so motivated, even without the frivolous invocation of the mediation procedures. In fact, the nature of mediation generally discourages its use as a tactical tool to cause delay. We submit that adoption of mediation as the dispute resolution vehicle of choice obviates the necessity of determining the manner in which to penalize those funding entities who chose to invoke the dispute resolution mechanism for delay purposes. If this analysis proves inaccurate, the Commission can adopt rules once experience has illustrated the nature of whatever problem arises.

Respectfully submitted,

U S WEST, INC.

By: 

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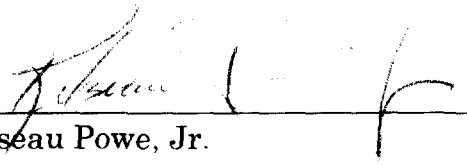
April 1, 1996

[4] Id. ¶ 1.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 1st day of April, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via hand-delivery, upon the persons listed on the attached service list.



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